

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
BOARD OF RESIDENTIAL BUILDERS AND
MAINTENANCE & ALTERATION CONTRACTORS**

In the matter of:

**L & G HOMES
GIACOMO LEONE, QUALIFYING OFFICER
License No. 21-02-095270**

**Docket No. 2002-1082
Complaint No. 21-01-0643-00**

OTHER LICENSE:

**GIACOMO GIOVANNI LEONE
License No 21-01-093478**

FINAL ORDER

WHEREAS, this matter having come before the Michigan Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the “Board”, on May 6, 2003 and

WHEREAS, the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Gregory Holiday, Administrative Law Judge, dated December 20, 2002,

WHEREAS, the Board having received the Hearing Report under MCL 339.514, and Giacomo Leone, Qualifying Officer, L & G Homes, Licensed Residential Builder, License No. 21-02-095270, hereafter “Respondent”, having been found in violation of Sections 604(c) and 2411(2)(m) of the Michigan Occupational Code, 1980 P.A. 299, *as amended*, hereafter the “Code”, MCL 339.604(c); MCL 339.2411(2)(m) and 51(4) of the State Board of Residential Builders and Maintenance & Alteration Contractors General Rules, *promulgated hereunder*, being 1979 AC, R 338.1551(4) and

WHEREAS, the hearing report being hereby incorporated by reference; now, therefore,

IT IS HEREBY ORDERED, that the following penalties authorized by Section 602 of the Code are hereby imposed:

- 1. Respondent shall pay a FINE in the amount of One Dollar and 00/100 Cents (\$1.00), due to the licensee's efforts to respond, said fine to be paid by cashier's check or money order, with Complaint No. 21-01-0643-00 clearly indicated on the check or money order, made payable to the State of Michigan and sent to the Department of Consumer & Industry Services, Bureau of Commercial Services, Enforcement Division, P.O. Box 30185, Lansing, Michigan 48909, within sixty (60) days from the mailing date of this Final Order**

- 2. Respondent's failure to comply with each and every condition of this Final Order shall suspend any and all licenses held by Respondent, MCL 339.2405(3), including Giacomo Leone, Q.O., License No. 21-02-095270, and Giacomo Giovanni Leone, License No. 21-01-093478. No application for licensure, relicensure or reinstatement shall be granted by the Department until the fine imposed by this Final Order has been paid-in-full.**

- 3. Respondent shall submit in writing to the Michigan Department of Consumer and Industry Services, Bureau of Commercial Services, Audit Unit, P.O. Box 30018, Lansing, Michigan, 48909, proof of compliance, in a form acceptable to the Department, with each and every requirement of this Final Order.**

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the matter of

Docket No. 2002-1082

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-01-0643-00

v

**Agency: Bureau of Commercial
Services**

L & G Homes

**Giacomo Leone, Q.O.,
Respondent**

Case Type: Sanction

_____ /

**Issued and entered
this 20th day of December, 2002
by Gregory Holiday
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This proceeding was commenced with the filing of a Notice of Hearing upon a Formal Complaint dated March 20, 2002, charging Respondent with one or more violations of the Occupational Code, 1980 PA 299, as amended (Code), MCL 339.101 *et seq.* Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*, Respondent was afforded an opportunity to demonstrate compliance prior to the commencement of formal proceedings. Respondent failed to satisfactorily demonstrate compliance and, as a result, the matter was set and noticed for a formal hearing.

The hearing was scheduled to be held on September 4, 2002 at 9:00 a.m., at the Bureau of Hearings of the Department of Consumer and Industry Services, Cadillac Place,

2nd Floor Annex, Room 2-700, 3026 West Grand Boulevard, Detroit, Michigan. Because a related matter was postponed at Respondent's request, this matter was continued to Monday, October 21, 2002 at 9:00 a.m., and the same proceeded as scheduled. Gregory Holiday presided as Administrative Law Judge. Tracey Hampton Yarborough, Esq., appeared on behalf of the Bureau of Commercial Services' Enforcement Division of the Department of Consumer and Industry Services (Petitioner). Lori Boughner and Inspector Paul Wilcox testified as witnesses for Petitioner. Francis J. Hearsch, Jr., appeared on behalf of L & G Homes, Giacomo Leone, Qualifying Officer (Respondent). Mr. Leone testified as the sole witness for Respondent.

ISSUES AND APPLICABLE LAW

The general issue presented is whether Respondent violated the Code, with respect to the practice of a residential builder. The specific issues are whether Respondent violated Builder Rule 1979 AC, R 338.1551(4) and Sections 604(c) and 2411(2)(m) of the Code, which provide, in pertinent part:

Sec. 604. A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

(c) Violates a rule of conduct of an occupation.

Sec. 2411... (2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

Rule 51...(4) If a complaint is justified by the local building inspector or by a person authorized by the department to make inspections, the builder or contractor shall correct the complaint within a reasonable time. Failure or refusal by the licensee to correct a structural matter that is materially deficient, dangerous or hazardous to the owners shall be presumed to be dishonest or unfair dealing.

EXHIBITS

Petitioner offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	Copy of 7/8/99 Buy & Sell Agreement
2	Copy of 1/23/01 Statement of Complaint of Lori Boughner (pages 1 and 2 only)
3	Copy of 2-page 6/18/01 Daniel Construction Proposal To Repair Flooring
4	4/20/02 Estimate from H & C Home Construction, Inc.
5	Copy of Notice to Respondent (Rejected)
6	Copy of 2/5/01 Building Inspection Report
7a	Copy of 10/24/01 Repair/Correction Notice to Respondent

7b Copy of 10/24/01 Certificate of Mailing of Repair/Correction Notice to Respondent

Respondent offered no additional exhibits for consideration at the hearing.

FINDINGS OF FACT

In about July 1999, Lori and Paul Boughner found a new home constructed by Respondent at 539 Allison Drive in Almont. They entered into a Buy & Sell Agreement (Petitioner Exhibit 1) to purchase the home for \$149,500.00 with the understanding that they would be responsible for their own lights and flooring. When they bought the home, it came with plywood subfloors. The Boughners engaged a carpet company to install underlayment and then carpeting on some floors and linoleum on the kitchen floor.

In the fall of 1999, the Boughners noticed roof leaks and areas where there were dips when you walk across the kitchen floor. Respondent had the roof leaks repaired but the repairs apparently did not hold. At the Boughners' request, Respondent performed roof leak repairs five times between the fall of 1999 and the fall of 2000, when the problems were finally corrected. With regard to the kitchen floor dips, the flooring company came out at their request, examined the floor, and concluded that the subfloor was defective and not their responsibility. With that information, the Boughners contacted Respondent about the floor problem with no success. Thereafter, in January 2001, Lori Boughner filed a Statement of Complaint (Petitioner Exhibit 2). Since the filing of the complaint, Respondent examined the kitchen floor. According to Mr. Giacomo:

there was a seam every four feet all across the linoleum kitchen floor unrelated to the subfloor and likely related to the underlayment used by the finish flooring installers. The linoleum was in 4 x 8 sections and the plywood subflooring is laid the opposite way from the seams for the underlayment. In his opinion, it is not a subfloor problem because the seam problem exists every four feet, consistent with the underlayment.

Based upon these findings, Respondent proposed to take up the linoleum floor to determine the cause of the dips with the understanding that if the cause was not the subfloor, the Boughners would be responsible for the costs to take up the flooring, correct the problem and replace the flooring. When the Boughners would not agree to those terms, Respondent refused to take any action to correct the problem.

Paul M. Wilcox has served as a Building Inspector for Almont Township, Imlay Township, and the Village of Almont for over ten years. He has been a licensed builder since the mid-1970s. At Petitioner's request, Inspector Wilcox performed a complaint inspection at the Boughner's home on about February 5, 2001. Upon that inspection, he issued his Building Inspection Report (Petitioner Exhibit 6) which verified two items (evidence of roof leakage and kitchen subfloor). From the basement, Inspector Wilcox observed that the subfloor was not properly nailed to the floor joists which could result in fluctuation. He views it as a difficult item to repair with the most efficient way to take up the flooring, fasten the subflooring to the joists and replace the floor. He also saw evidence of water leaking in the roof. Inspector Wilcox views the subfloor problem as a workmanship defect. On cross-examination, Inspector Wilcox conceded that with the inspection occurring quite some time ago, he had no specific recollection of how extensive the problem was in the kitchen; that a

failure to properly staple the underlayment to the subfloor could be a cause of the sponginess he discovered; and that the persons installing the flooring should have checked the subfloor to assure that it was proper before installing the underlayment and finish flooring. Having dealt with Respondent on other construction projects, Inspector Wilcox views Mr. Giacomo to be a responsible builder.

The Boughners obtained two estimates, one from Daniel Construction (Petitioner Exhibit 3) and the other from H & C Home Construction (Petitioner Exhibit 4) to correct the flooring problem. Neither estimate is an appropriate measure for restitution in this case. Respondent is only responsible for the cost of removing the flooring and properly renailling the subfloor to the floor joists. There is insufficient evidence in this record to establish that the dips or sponginess in the kitchen floor are the result of Respondent's improper nailing of the subfloor.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading & Practice (2d ed) § 60.48, page 230. The burden of proof is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon Respondent. 1990 AACRS, R 339.1763.

Violation of Section 604(c) of the Code

By this charge, Petitioner asserts that Respondent violated Builder Rule 338.1551(4) by failing to correct a justified item of complaint within a reasonable time. The two items of complaint relevant to this charge are the roof leak and the kitchen subfloor.

Because Respondent corrected the roof leak within a reasonable time, there is no violation as to that item. On the subfloor, while it would have been better for the finish flooring installers to have discovered and corrected the subflooring defects attributed to Respondent, their failure to do so does not diminish Respondent's responsibility to correct those defects (failure to properly nail the subfloor to the joists). Respondent's failure to correct the above-described kitchen subfloor problem constitutes a violation of Builder Rule 338.1551(4).

The violation of Builder Rule 338.1551(4) constitutes a violation of Section 604(c) of the Code.

Violation of Section 2411(2)(m) of the Code

By this charge, Petitioner asserts that on the Boughner construction project, Respondent practiced poor workmanship or workmanship not meeting the standards of the custom or trade, verified by a building code enforcement official in violation of Section 2411(2)(m) of the Code.

A builder is required to do the job right the first time. *Arndt v Dept Licensing and Regulation*, 147 Mich App 97; 383 NW2d 136 (1985). In this case, when Respondent failed to properly nail the subfloor to the floor joists in the kitchen area, that failure constituted poor workmanship within the meaning of Section 2411(2)(m) of the Code.

Accordingly, Petitioner has proven, by a preponderance of the evidence, that Respondent violated Section 2411(2)(m) of the Code.

DECISION AND RECOMMENDED SANCTIONS

It is the decision of this Administrative Law Judge that Respondent violated Builder Rule 338.1551(4) and Sections 604(c) and 2411(2)(m) of the Code as described in this Hearing Report. Petitioner recommended that sanctions include payment of a civil fine in the amount of \$2,500.00 and payment of restitution to Lori and Paul Boughner in an amount between \$13,800 and \$15,297.61. Because Respondent was not shown to have been responsible for the defects that caused the Boughners' complaint, its responsibility for restitution is limited to the cost to removing the kitchen flooring and properly nail the subfloor to the floor joists.

It is recommended that the Board include the following as sanctions in this matter:

1. Payment of a civil fine in the amount of \$750.00.
2. Payment of restitution to Lori and Paul Boughner in the amount of \$2,000.00.
3. In the event the civil fine and restitution have not been paid within 60 days following the issuance of a final order, then all Article 24 licenses should be suspended and no new or renewal licenses should be issued until the civil fine and restitution have been paid.

Gregory Holiday
Administrative Law Judge